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RICHARD M. RIEHL

February 5, 1996

OUR FILE NO.
1162-101-63

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-158
APPLICATION FOR REVIEW

Dear Mr. Caton:

On behalf of Donald B. Brady, an interested party in the above-referenced proceeding, please find enclosed an original and four copies of Mr. Brady's Application For Review.

Should you have any questions concerning this matter, please contact the undersigned directly.

Very truly yours,

Richard M. Riehl

RMR/jjb
Enclosures

Before The

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 93-158
Table of Allotments	)	RM No. 8239
FM Broadcast Stations,	)	
	)	
Hazlehurst, Utica and	)	
Vicksburg, Mississippi	)	

TO: The Commission:

APPLICATION FOR REVIEW OF DONALD B. BRADY

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Counsel For Donald B. Brady

April 1, 1996

SUMMARY

The Notice of Proposed Rulemaking in this FM allocation proceeding to change channel and upgrade Station WJXN(FM) at Utica, Mississippi, advised that expressions of interest would be accepted and that if such an expression of interest was filed, proponents would have to demonstrate the availability of a comparable channel or the proceeding would be terminated.

Mr. Brady timely filed his expression of interest. Proponents made no effort to demonstrate the availability of another channel. Rather, long after the period for seeking reconsideration had expired, proponents argued that the *NPRM* was in error, that this proceeding involved an "incompatible channel swap," and that the provisions of 1.420(g)(3) – which preclude participation by otherwise interested persons – should be applied in this case. Brady in response contended, because proponents arguments were first raised after the reconsideration period had expired, that the provisions in the *NPRM* addressed by proponent's late filed submission affected his participation rights which had become final and therefore could not be later changed.

The Bureau erroneously ruled that the *NPRM* was interlocutory in its entirety and thus could be modified in any way the Bureau saw fit and then invoked the preclusionary provisions of Rule 1.420(g)(3). The effect was to deprive Brady of the right to participate in this proceeding

accorded in the *NPRM* based on matter first raised after those provisions of the *NPRM* had become final.

Under the Commission's enunciation, the "incompatible channel swap" doctrine would not apply if there was another available channel at the community whose channel was to be exchanged. There was an another available channel, thus rendering the preclusionary effects on participants of Section 1.420(g)(3) inapplicable. In order to reach a different result in this case the Bureau, contrary to its own precedent, grafted onto the Commission's "incompatible channel swap" doctrine a new and novel concept -- that in order to forestall the preclusionary effect of Section 1.420(g)(3) – the additional channel must be available at the existing station's transmitter location.

This ruling, without notice of any kind, it is submitted, exceeded the Bureau's delegated authority and, since it affected Brady's substantial procedural rights, could not, in any event, be applied retroactively.

Review and reversal is mandated to correct the errors of law contained in the Bureau's orders in this case.

Before The

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 93-158
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FM Broadcast Stations,	)	
	)	
Hazlehurst, Utica and	)	
Vicksburg, Mississippi	)	

TO: The Commission:

APPLICATION FOR REVIEW

Donald B. Brady ("Brady"), a Party expressing interest in the allocation of Channel 265C3 at Utica, Mississippi, by his attorneys and pursuant to Section 155(c) of the Communications Act and Section 1.115 of the Commission's Rules, hereby respectfully requests the Commission to review the *Report and Order (R&O)*, 9 FCC Rcd 6439 (MMB 1994) and the *Memorandum Opinion and Order ("MO&O")* (DA 96-175, 61 FR 1999, March 1, 1996) of the Mass Media Bureau ("Bureau") which denied Brady's Petition for Reconsideration of the Bureau's denial of Brady's right to participate in the above-captioned proceeding, even though Mr. Brady had timely expressed an interest in the proposed allocation pursuant to the directions contained in Paragraph 3 of the *Notice of Proposed Rule Making* , 8 FCC Rcd 4080 (MMB 1993)("*NPRM*").

Review by the Commission is sought on the grounds that (1) the Bureau's effective modification of paragraph 3 of the *NPRM* was contrary to law; (2) the ruling that this proceeding involves an "incompatible

channel swap" is a question of law which the Commission has not previously resolved, and (3) denying Mr. Brady the right to participate in this proceeding as an interested party constitutes prejudicial procedural error. 47 C.F.R. § 1.115(b)(2)(i) - (iii) and (v). In support thereof, the following is respectfully submitted.

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Bureau's ruling that the provisions of the *NPRM* permitting participation by interested parties was interlocutory, and hence not subject to petitions for reconsideration, was contrary to law.

B. Whether the Bureau's effective modification of the interested parties' provisions in the *NPRM*, based on matters first raised after the period permitted by Section 405 of the Communications Act for seeking reconsideration had passed, was contrary to law and hence void *ab initio.*

C. Whether the Bureau's ruling, in an "incompatible channel swap situation," that an available alternative channel will not be considered unless allocable at the existing station's transmitter site, is contrary to the Bureau's own precedent.

D. Whether the Bureau exceeded its delegated authority when it ruled, in an "incompatible channel swap situation," that an available alternative channel will not be considered unless allocable at the existing station's transmitter site.

E. Whether the "incompatible channel swap" ruling, assuming it is affirmed by the Commission, affects the substantive rights of interested persons and hence could only be applied prospectively.

STATEMENT OF THE CASE

1. The *NPRM* in this proceeding, published in the Federal Register on June 23, 1993,[1] established a Comment Date of August 9, 1993. The *NPRM* held, in effect, that this proceeding did not involve an "incompatible channel swap" (See *NPRM* para. 3).[2] In accordance with the *NPRM*, Mr. Brady timely filed an expression of interest in the proposed Utica allocation.[3] Rather than submit a showing establishing that another comparable channel is available at Utica as required by Section 1.420(g) of the Rules and the *NPRM*, Proponents in their Comments and Reply Comments argued, for the first time,[4] that the *NPRM* was in error and that this proceeding involved an "incompatible channel swap" under Section 1.420(g)(3) of the Rules[5] and hence no other expressions of interest could be considered.

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[1] 58 F.R. 34025.

[2] Paragraph 3 provides in pertinent part: ". . . However, in accordance with Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the C3 allotment at Utica, the modification cannot be implemented unless an equivalent class channel is also allotted."

[3] The Bureau initially found that Brady's comments were not timely filed. *R&O*, 9 FCC RCD at 6439 Note 4. However, on reconsideration, Mr. Brady's comments were accepted as timely. *MO&O*, p. 1, para. 7.

[4] The Petition for Rulemaking did not mention Rule 1.420(g)(3) - the provision precluding participation by other parties.

[5] Modification of FM Broadcast Licenses To Higher Class Co-Channels or Adjacent Channels, 60 Rcd 114 (1986). (Modification of FM Broadcast Licenses)

2. Brady, in response to the new matter raised in Reply Comments filed Supplemental Comments. This submission brought to the Bureau's attention the fact that portions of the *NPRM* dealing with the participation rights of interested parties was a Final Order that had become Final before the Proponents alleged the existence of error in the *NPRM* . On this basis, Brady contended that the *NPRM* could not be modified. Ruling that Brady's Supplemental filing was not timely (R&O para. 1, note 5), the Bureau refused to consider it, even though the Bureau accepted and considered the untimely matter filed by Petitioners to which Brady's Supplemental Comments were addressed. Based solely on Petitioners' Comments, the Bureau concluded that this proceeding in fact involved an "incompatible channel swap," situation, invoked Section 1.420(g)(3) of the Rules and rejected Mr. Brady's expression of interested specifically called for in Paragraph 3 of the *NPRM.* (R&O, 9 FCC Rcd at 6439 Note 4).

3. Mr. Brady timely sought reconsideration of those portions of the *R&O* that held Mr. Brady's initial comments and Supplemental Comments to be untimely. As previously mentioned, the Supplemental Comments addressing the "incompatible channel swap" issue, first raised by Petitioners in their Comments and Reply Comments, contained information demonstrating that these contentions were too late to be considered and further, in fact this proceeding was not an "incompatible channel swap" situation. Mr. Brady also noted in his Petition for

Reconsideration (p. 3, Note 5) that issues relating to the Bureau's novel interpretation of the Commission's "incompatible channel swap" doctrine would, if necessary, be addressed in a subsequent application for review.

4. The *MO&O*, although acknowledging the arguments contained in Brady's Supplemental Comments, nevertheless went on to conclude that the *NPRM*, in its entirety, was interlocutory and hence could be modified in any manner the Bureau saw fit (*M&O* para. 8-9). Further, after acknowledging that the Petitioners' "incompatible channel swap" arguments were first raised in their Comments and Reply Comments[6] and that, in fact, there was a second channel available for allocation at Hazelhurst, the Bureau nevertheless concluded, contrary to the express language of the Commission's "incompatible channel swap" doctrine and its own precedent, that because the second channel could not be allocated at the existing station's transmitter location, it was not an available channel within the meaning of the Commission's "incompatible channel swap" doctrine.

5. The effects of these rulings were, contrary to the express language of Paragraph 3 of the *NPRM*, to strip Mr. Brady of his status as an interested party and to reject, without substantive consideration, his expression of interest in the proposed Class C3 allocation at Utica.

[6] Petitioner's filings were submitted more than thirty days after the *NPRM* was published in the Federal Register.

6. Brady submits that the Bureau's rulings are arbitrary and capricious because they fail to provide the reasoned analysis required, are contrary to law and the Bureau's own precedent, and, with respect to "incompatible channel swaps", reached a conclusion that was erroneous and exceeded the Bureau's delegated authority.

ARGUMENT

Reconsideration Issues

A. Whether the Bureau's ruling that the provisions of the *NPRM* permitting participation by interested parties was interlocutory, and hence not subject to petitions for reconsideration, was contrary to law.

The Bureau ruled, citing language and not substance in a number of cases as support, that the *NPRM* could not be a final order because it would deprive the Commission of the necessary flexibility to modify its Rules in a manner most consistent with the public interest. The Bureau is incorrect.

An *NPRM* in an FM allocations proceeding does two things. First it gives notice that it intends to amend Section 73.202(b) of the Rules. Second, the *NPRM* establishes the ground rules under which the proceeding is conducted, including the *Ashbacker*[7] rights of interested parties. An *NPRM* thus has two facets, the second of which fixes rights and imposes legal obligations on all persons wishing to participate.

[7] *Ashbacker Radio Corp. v. F.C.C.* 326 US 327 (1945).

Clearly, the cut-off dates fix participation rights. Similarly, paragraph 3 of the *NPRM* gave Proponents clear and precise notice of what was required if an expression of interest is filed and the effect – dismissal of the proceeding – if Proponents failed to comply. Proponents neither timely sought reconsideration of the *NPRM* nor made any effort to satisfy the mandate imposed by the *NPRM*.

The Bureau, it is submitted, cannot have it both ways. If, as the Bureau initially held (*R&O* at para. 1 and Note 4) that the *NPRM* required, on grounds of timeliness, that Brady's legal right to participate be foreclosed, there can be no question that the *NPRM* is, in part, a Final Order[8]. Brady, as the Bureau subsequently concluded, [9] in fact, complied with the mandate of the *NPRM*. Proponents did not. Yet it was Brady who was deprived of the rights accorded in paragraph 3 of the *NPRM* because the Bureau concluded the *NPRM* was interlocutory in its entirety.

Moreover, channel allocation proceedings, unlike general rulemakings, also involve the resolution of conflicting private claims to a

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[8] "[F]inal orders are not limited to the last order issued in a proceeding, but to be final an order must 'impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.'" *Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967) (quoting *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948)); *see also Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975).

[9] MO&O, para. 9. The NPRM was published in the Federal Register on June 23, 1993 (58 F.R. 34025) and therefore the reconsideration period expired on July 23, 1993. Proponents Comments were not filed until August 9, 1993 and the Bureau took no action during the thirty day period to correct the *NPRM* para. 3, which it later found to be erroneous.

valuable privilege. *Sagamon Valley Broadcasting*, 269 F.2d 221, 224 (D.C. Cir. 1959) and contain elements of "finality" not usually seen in general *NPRM*s. Further, in such proceedings, any submission made after dates fixed by statute, rule or in the *NPRM* may not be considered. 269 F.2d at 225.

The Bureau, in effect, acknowledges the submissions contending that this proceeding involved an "incompatible channel swap" were filed long after the period allowed by 47 U.S.C. § 405 to obtain reconsideration.[10] *NPRM* paragraph 3, without qualification, invited expressions of interest by other interested persons and put proponents expressly on notice that, if an expression of interest was received, proponents would have to demonstrate the availability of another Class C3 channel at Utica or the proceeding would be terminated. This paragraph thus unequivocally fixed the rights and obligations of the proponents as well as any other interested parties.[11]

One of the criteria for determining "finality" where non-final actions are involved, is "whether the agency action has the force of law, regardless of whether further administrative proceedings are necessary to implement the agency decision." *Potomac Electric Power Co. v. I.C.C.*, 702

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[10] The Bureau clearly considered Proponents' late filed arguments and modified the *NPRM* accordingly, yet refused to entertain Mr. Brady's timely response to these submissions because they were beyond the Comment period (R&O, p. 1, note 5).

[11] *See* Note 9 *supra*. "[F]inal orders are not limited to the last order issued in a proceeding, but to be final an order must 'impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.'" *Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967) (quoting *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113, 68 S.Ct.

F.2d 1026, 1030 (D.C. Cir. 1983) citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-50, 18 L.Ed. 2nd 681, 692. *NPRM* paragraph 3, it is submitted, did just that.

Moreover, in a parallel situation, the Commission's own rules reflect the finality of certain rulings in otherwise interlocutory orders and accords the same rights and imposes the same obligations on parties as those discussed above. Section 1.301 of the Rules requires different procedures depending on the nature of the interlocutory rulings. Thus, subsection (a) requires that an appeal from a ruling which ". . . (1) denies or terminates the right of any person to participate as a party to a proceeding" "may not be deferred." On the other hand, subsection (b) requires that other interlocutory rulings must be deferred unless allowed by the Presiding Officer.

While the Commission has yet to adopt a similar rule for its rulemaking proceedings, it seems fundamental that the term "final action" set forth in Section 1.429(a) must be similarly delineated in order to satisfy the mandate of Section 405 of the Act. What is clear from the foregoing is that use of the term "interlocutory" is only the threshold step the Commission must take in determining whether a particular ruling was a "final" ruling within the meaning of Section 405 of the Act. The Bureau in this case erroneously failed to take the next mandatory step and hence its ruling is fatally flawed. In short, the issue that must be resolved in each of these types of cases is not whether the "Order" is interlocutory but rather, whether the particular ruling finally determines

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431, 437, 92 L.Ed. 568 (1948)); *see also Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975).

an interested party's right to participation in the proceeding and/or whether adequate notice was given that a particular right or interest could be taken away as a conclusion in the proceeding.

Placed in the foregoing context, cursory analysis of the cases cited by the Bureau discloses they in fact support the conclusion that the provisions of an *NPRM* that directly affect the rights of interested parties to participate in a proceeding are "Final Orders" within the meaning of Section 405 of the Act and Section 1.429 of the Rules.

Thus, *Spartanburg Broadcasting, Inc. v. FCC*, 619 F2d 314, 321-22 (D.C. Cir. 1986) holds simply that in a rulemaking context an agency can change its mind -- so long as **adequate** *notice* is given. In *NBMC v. FCC*, 791 F2d 1016, 1022-23 (D.C. Cir. 1988), the court held that the Commission had deleted a minority preference without adequate notice and in *AFL-CIO v. Donovan*, 757 F2d 330, 338 (D.C. Cir. 1985) the court held arguments contained in comments filed by interested parties do not satisfy the notice requirements of 5 USC § 553. In this case the Bureau without any notice *and* in response to comments filed after the reconsideration period had passed, eliminated Brady's right to participate in the proceeding and thus violated the very Black Letter law it cited in support of its action. Arbitrary and capricious hardly describes this departure from precedent.

B. Whether the Bureau's effective modification of the interested parties' provisions in the *NPRM*, based on matters first raised after the period permitted by Section 405 of the Communications Act for seeking reconsideration had passed was contrary to law and hence void *ab initio*.

Proponents believed *NPRM* paragraph 3 was in error. They were therefore required to bring this error to the Commission's attention within the time specified in 47 U.S.C. § 405 or its right to make such arguments would be lost. *Action for Children's Television, Inc. v. F.C.C.*, 906 F.2d 752, 754-55 (D.C. Cir. 1990). (Failure to bring error to FCC's attention within the period prescribed in 47 U.S.C. § 405 precludes later consideration.).[12]

No one disputes that the *NPRM* was promulgated in accordance with applicable rules and statutes. Further, the mandate in *NPRM* paragraph 3 was usual and proper in proceedings such as this.

Since the claims of error in *NPRM* para. 3 were first raised after the reconsideration period had expired, the refusal of the *R&O* and *MO&O* to implement the *NPRM* as mandated by paragraph 3 and holding that no other expressions of interest would be considered, violated the express provisions of 47 U.S.C. § 405(a) and therefore must be set aside.

[12] " . . . Section 405(a) applies to procedural issues in the rulemaking context." *Id.* at 755.

In short, the Bureau did not hold that the *NPRM* was not valid on its face or that it was not issued in accordance with the Commission's Rules. The Bureau simply held, on later reflection long after the reconsideration period had expired, that the *NPRM* was in error. The Bureau was therefore without jurisdiction to reconsider and modify those portions of the *NPRM* here under consideration. *Reuters Ltd. v. FCC*, 781 F.2d 946, 59 RR2d 1063 (D.C. Cir. 1986). (Once an Order, issued in accordance with the Commission's Rules becomes final, the agency may not set it aside). *Accord. Hughes Moore & Associates*, 7 FCC Rcd 1454, 1455 (1992) (Once an Order is final any attempt to modify it is void *ab initio*.)

Incompatible Channel Swap Issues

C. Whether the Bureau's ruling, in an "incompatible channel swap" situation, that an available alternative channel will not be considered unless allocable at the existing station's transmitter site, is contrary to the Bureau's own precedent.

In the course of adopting Section 1.420(g)(3) of the Rules which identify mutually exclusive situations where channel upgrades are permissible without consideration of third party expressions of

interests,[13] the Commission was asked to consider, within the ambit of this rule, situations where another channel change, neither co-channel nor adjacent channel, was required to accomplish the upgrade. After careful consideration the Commission promulgated the "incompatible channel swap" doctrine.[14] In that Order, the Commission defined an "incompatible channel swap" situation as one where Community A must exchange its channel (or an adjacent channel) with Community B; the allotment must require the deletion of the exchange channel at Community B; and community A's channel "must be the only [channel] which can be substituted at Community B." *FM Channel Assignments, Blair, Nebraska,* 8 FCC Rcd. 4086, 4088 (MMB 1993) citing *Modification of FM Broadcast License to Higher Class Co-Channels or Adjacent Channels*, 60 RR2d. 114, 120, para. 24 ("*Modification of FM Licenses*") (1986).

Until this proceeding, even the Bureau had regarded the availability of another alternative channel at either community, without reference to the transmitter location of the licensee, as a bar to invoking the participation restrictions contained in rule 1.420(g)(3). In *Dyersburg, Tennessee*, 4 FCC 4814, 4816 paras. 16-17 (MMB 1989), the Bureau refused to apply the doctrine where an alternative channel was available.

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[13] Prior to this rule change, any channel upgrade or change of community of allotment in FM and TV rulemaking proceedings, triggered so-called *Ashbacker* rights under Section 309 of the Act, which in turn mandated acceptance of competing expressions of interest for the changed facilities.

[14] *Modifications of FM Licenses*, supra.

The possible availability of that channel at the existing stations transmitter site was not mentioned. Finally, in *Blair, Nebraska*, 8 FCC Rcd 4086, 4088, para. 12 (MMB 1993), the Bureau again refused to apply the doctrine where an alternative channel was available.[15] The necessity for any channel to be allocable at the existing station's transmitter location until this case, was not a relevant factor. The Bureau's unexplained departure from its own precedent, it is submitted, must be reversed.

D. Whether the Bureau exceeded its delegated authority when it ruled, in an "incompatible channel swap situation," that an available alternative channel will not be considered unless allocable at the existing station's transmitter site.

As reflected in the foregoing discussion, the only cases cited by the Bureau in support of its conclusions in this case were Bureau rulings. In reaching the conclusion that an available channel must be allocable at the licensee's transmitter site, the Bureau attempted to graft onto the Commission's "incompatible channel swap" doctrine, the Commission's equitable requirement, in forced channel change situations, that a required site change will not be permitted without the consent of the licensee. While such a provision in most of those cases -- one station should not be allowed to reap an economic benefit at a cost to another -- is one thing, extending the ruling so as to bar other expressions of

[15]In Pikeville, Kentucky, 6 FCC Rcd 3732, 3733, para. 7 (MMB 1991), the Bureau found the Commission's "incompatible channel swap" doctrine to apply even where a change in transmitter location at both communities was required.

interest as are generally required under Section 309 of the Communications Act is quite another.

Because Section 1.420(g)(3)[16] has a preclusive effect on the participation of otherwise interested parties in Commission allocation proceedings, its parameters had to be narrow. The "incompatible channel swap" doctrine, since it has the effect of extending the preclusionary effect of Section 1.420(g)(3) even further, of necessity, had to be even more precise. The Bureau's ruling in this case goes so far as to make it possible for the proponent, even where an alternative channel is available, to forestall other expressions of interest and the need to demonstrate the availability of another comparable channel, by simply not offering to pay for an otherwise necessary change in transmitter site.

Sections 0.283(b)(2) and (b)(6) of the Rules require the Bureau to refer matters to the Commission that present "new or novel arguments not previously considered by the Commission" and Petitions for Rulemaking not involving routine changes in the Table of Assignments. The foregoing it is submitted clearly demonstrates that the Bureau's ruling in this case went far beyond the Commission's "incompatible channel swap" doctrine. It was thus, "new," "novel" and "non-routine" and hence beyond the Bureau's delegated authority.

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[16] 1.420(g)(3) and (i) for that matter do little more than follow the AM rule in major change cases that for a mutually exclusive application to be accepted, it must not conflict or cause interference to the proponent's existing licensed facilities

E. Whether the "incompatible channel swap," ruling assuming it is affirmed by the Commission, affects the substantive rights of interested persons and hence could only be applied prospectively.

The sharp departure described above from the standard set forth in *Modification of FM Licenses* gives rise to an even more serious problem in terms of the retroactive application of this new standard in this case.

Again, it must be emphasized, the Bureau's action in this case, without prior notice, deprived Brady of his *Ashbacker* rights based upon a different standard from that enunciated in *Modification of FM Licenses* and as set forth in the *NPRM* itself. It follows therefore, even if the Commission were to conclude that the Bureau's modification of the "incompatible channel swap" standards enunciated in *Modification of FM Licenses* is appropriate, it may, under existing law, be applied only prospectively:

> "...Unless the burden of imposing the new standard is *de minimis*, or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect. ..."

Retail, Wholesale and Dept. Store Unions v. N.L.R.B. 466 F2d 380, 392 (D.C. Cir. 1972), *citing SEC v. Chenery* 332 US 194 (1947).

The considerations involved in determining whether a new standard may be applied retroactively are:

> "...(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which the retroactive order places on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. ..."

Ibid. at p. 390. Applying these factors to this case demonstrates that the new standard enunciated by the Bureau may not be applied retroactively.

The "incompatible channel swap" doctrine has been in effect for nearly ten years and hence, this is not a case of first impression. Further, this ruling is indeed an abrupt departure from the ten year old standard and, as demonstrated above, represents a departure from the Bureau's earlier rulings. Moreover, Brady relied not only on the established "incompatible swap doctrine", but on the published notice in this proceeding that clearly and expressly defined the participation rights of interested parties as well as the proponents.

Paragraph 3 of the *NPRM* (in the form regularly utilized in this type of situation) gave Brady the right to express an interest in the to be upgraded channel at Utica and clearly delineated for proponents the terms and conditions under which this proceeding could go forward in

the event an expression of interest was filed. Brady complied with this directive. Proponents did not. Yet, the new ruling by the Bureau deprived Brady of his right to participate in this proceeding while rewarding proponents for their failure to comply. Clearly, retroactive application of this new ruling will do material harm to Brady. On the other hand prospective application of this new interpretation would do nothing more or less to proponents than the notice provided in the *NPRM* provided. Thus proponents failures are their own and not the result of this ruling. Clearly then, Brady is the only party that would suffer material harm from the retroactive application of this new standard.

Finally, it is submitted, since this new interpretation of the "incompatible channel swap" doctrine has the effect of further restricting the participation rights of interested parties accorded in Section 309 of the Act in Commission allocation proceedings and, in this case, is inconsistent with the requirements of Section 405 of the Act, there is no statutory interest in giving this new "incompatible channel swap" standard retroactive application.

CONCLUSION

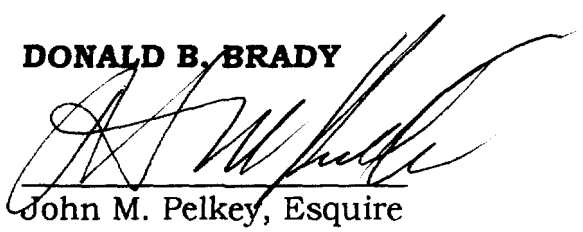
The foregoing has demonstrated that the Bureau's rejection of Brady's timely filed expression of interest, based on matters raised after the reconsideration period provided by Section 405 of the Act and Section 1.429 of the Rules had expired, is contrary to law. In addition, the Bureau's enunciation of a new "incompatible channel swap" standard

was not only contrary to its own prior holdings, but involved issues affecting a party's substantive rights beyond its delegated authority to resolve and, in any event, could not have been applied retroactively in this case.

In light of the above, the Commission is requested to review and reverse the Bureau's action in this case and order the proceeding terminated for proponents' failure to satisfy the requirements expressly set forth in Paragraph 3 of the *NPRM*.

Respectfully submitted,

DONALD B. BRADY



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April 1, 1996

CERTIFICATE OF SERVICE

I, Jennifer J. Britt, an employee in the law offices of Haley, Bader & Potts, hereby certify that I have on this 1st day of April, 1996, sent copies of the foregoing "APPLICATION FOR REVIEW OF DONALD B. BRADY" by first-class United States mail, postage prepaid, to the following:

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*Hand Delivered